No. 76-279

In the Supreme Court of the United States

OCTOBER TERM, 1976

PASQUALE CHARLES MARZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Apps. A, B) is reported at 537 F. 2d 257. The opinion of the district court on petitioner's motion to suppress is reported at 388 F. Supp. 906.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1976, and a petition for rehearing with suggestion of rehearing *en banc* was denied on June 28, 1976 (Pet. App. C). On July 26, 1976, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including August 27, 1976, and the petition was filed on August 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the facts of this case, the involvement of United States officials in a foreign arrest and search was sufficient to subject the foreign governmental action to the requirements of the Fourth Amendment.

2. Whether the district court abused its discretion in limiting cross-examination and impeachment of the principal government witness.

3. Whether theft of money from a single location that belongs to different federally insured banks constitutes more than one offense.

4. Whether theft of money from federally insured banks and interstate transportation of the stolen money constitute separate offenses.

5. Whether the district court properly instructed the jury on the elements of the offense of bank larceny.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of bank larceny, in violation of 18 U.S.C. 2113(b) (Counts 2 to 7), transportation of more than $5,000 of stolen money in interstate commerce, in violation of 18 U.S.C. 2314 (Count 12), and conspiracy to commit those offenses, in violation of 18 U.S.C. 371 (Count 1). He was sentenced to concurrent terms of ten years' imprisonment on the larceny counts and five years' imprisonment on the conspiracy count, and to a consecutive term of ten years' imprisonment on the transportation count. The court of appeals affirmed (Pet. App. A), one judge dissenting (Pet. App. B).

The sufficiency of the evidence of petitioner's guilt is not in dispute. In brief, the evidence at trial showed that petitioner and five other persons conspired in October 1974

to steal more than $3 million from the vaults of Purolator Security, Inc., a company that provides armored car service for the transportation of cash between banks and business establishments in Chicago, Illinois.[1] Petitioner's role in the illegal venture was established primarily by the testimony of co-conspirator Peter Gushi,[2] a long-time friend of petitioner, and Martin Pollakov, a government informant who worked in a discount store owned by Gushi. Gushi testified in detail to the Purolator burglary scheme that he and petitioner had devised, which included plans to "wash" the proceeds through the banking system of Grand Cayman Island (Tr. 1173-1268). Much of this testimony was corroborated by Pollakov (see, *e.g.*, Tr. 943-976).

The plan was executed on October 21, 1974, when several million dollars in cash were stolen from Purolator (Tr. 171-172). On October 30, 1974, petitioner was arrested on Grand Cayman Island by local police, who seized part of the stolen money and other incriminating objects from his person and luggage (Tr. 1506-1512). Petitioner was then returned to the United States, where he was arrested pursuant to a warrant.[3]

ARGUMENT

1. Petitioner contends (Pet. 16-25) that the courts below erred in finding that the Fourth Amendment did not apply to his arrest and search by authorities on Grand Cayman

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[1]An extensive summary of the evidence at trial is included at pp. 3-19 of the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[2]Gushi pleaded guilty to several counts prior to trial (Pet. App. 3).

[3]The federal warrant had been issued on October 30, 1974, but that fact was not known to Grand Cayman authorities at the time of petitioner's arrest in that country (Pet. App. 17, n. 7).

Island because "the involvement of the Government agents in this case was too insignificant for them to be considered participants in the actions of the foreign police official" (Pet. App. 18-19). As petitioner concedes (Pet. 17), the determination of whether the degree of federal participation in a foreign search is sufficient to implicate the Fourth Amendment and its exclusionary rule is a factual one. See *United States* v. *Janis,* No. 74-958, decided July 6, 1976, slip op. 22-23, n. 31. The district court and the court of appeals each concluded that the amount of federal involvement here was insufficient, and the correctness of this concurrent finding of fact of two lower courts does not warrant further review. See, *e.g., Berenyi* v. *Immigration Director,* 385 U.S. 630, 635-636; *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275. In any event, the evidence shows that the findings of the courts below are amply supported by the record.[4]

Within ten days of the theft, the Federal Bureau of Investigation had identified several participants in the crime and had traced petitioner and co-conspirator Luigi DiFonzo to Grand Cayman Island. F.B.I. Agents Francis Pieroni and Patrick Farrell went to the island, where they were met by Detective Superintendent Derrick Tricker of the Grand Cayman police, whom they had previously

[4]Petitioner apparently contends (Pet. 18) that his arrest and subsequent search by Grand Cayman authorities violated the Fourth Amendment because they were conducted without a warrant. The Fourth Amendment, however, does not require a warrant for an arrest in a public place (*United States* v. *Watson,* 423 U.S. 411), and the warrantless searches were justified as incident to the arrest. Moreover, although the district court made no finding as to whether the Grand Cayman police had probable cause to arrest petitioner (Pet. App. 16), that arrest, as we note below, occurred for violation of Grand Cayman rather than federal law, and "[petitioner] does not appear to contend that the arrest or search incident thereto was illegal under Cayman law" (Pet. App. 17).

contacted (S. Tr. 98-100, 148-152).[5] At the outset, Tricker advised the agents that they could not carry weapons on the island (S. Tr. 76), that they had no jurisdiction to interrogate anyone or to take anyone into custody, and that any investigation would be conducted by his department (S. Tr. 77). While on the island, the F.B.I. agents did not question anyone (S. Tr. 80), and did not request that Superintendent Tricker make an arrest or search (S. Tr. 24-25).

Acting independently of the agents, Tricker determined from the Grand Cayman immigration office that petitioner was on the island and checked with local hotels to determine where he was staying. At approximately 9:30 p.m. on October 30, 1974, Tricker went to the airport and saw petitioner and DiFonzo at an exit gate waiting to board an airplane. He immediately approached them, identified himself, and asked them to accompany him into an airline office. Tricker asked for their names and travel documents and obtained from DiFonzo two airline tickets in the name "Stewart." Petitioner and DiFonzo were then arrested for refusing to identify themselves, which is an offense under Grand Cayman law (S. Tr. 20-21, 30). At the police station, petitioner and DiFonzo were searched and certain money and papers were seized. Although the F.B.I. agents were present during the arrest and search, they did not request that petitioner be arrested or searched, did not interrogate petitioner, and did not participate in the arrest or search in any way (S. Tr. 23, 98-100, 110, 141-144, 149-152, 155, 166-167). The following day, petitioner and DiFonzo returned to Miami in the company of a Grand Cayman police officer whose air fare was

[5]"S. Tr." refers to the transcript of the January 24, 1975, suppression hearing.

paid by the F.B.I. agents (S. Tr. 25, 27, 39, 98-99). Prior to boarding, Superintendent Tricker handed Agent Farrell the money and other materials that had been seized from petitioner (Tr. 88).[6]

Thus, as the court of appeals observed (Pet. App. 18), "Tricker jealously guarded his prerogatives and reached his own decisions about what to do with the information which the FBI had provided him." While it is true that Grand Cayman authorities might not have taken action against petitioner and DiFonzo if the F.B.I. agents had not called their attention to petitioner's and DiFonzo's presence on the island, providing information to a foreign official is not sufficient involvement for the government to be considered a participant in acts the foreign official takes based on that information. *Stonehill* v. *United States,* 405 F. 2d 738, 746 (C.A. 9), certiorari denied, 395 U.S. 960; *Birdsell* v. *United States,* 346 F. 2d 775, 782 (C.A. 5) (Friendly, J.), certiorari denied, 382 U.S. 963; *Shurman* v. *United States,* 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 921. Nor was the mere presence of the federal agents at the time of the search by Tricker sufficient to federalize the search. *Stonehill* v. *United States, supra,* 405 F. 2d at 744. Finally, as the court of appeals noted (Pet. App. 19):

> [Petitioner and DiFonzo] violated Grand Cayman law, according to Tricker, and that [was] the reason for which he arrested them. That he might also have

[6]Petitioner contends (Pet. 24-25) that Agent Farrell's acceptance of this evidence at the airport constituted an unlawful seizure, regardless of the validity of the earlier arrest and search by Grand Cayman police. This argument is insubstantial, since the seizure had occurred on the previous day. As the court of appeals correctly held (Pet. App. 20), "Superintendent Tricker's action in turning the items over to the FBI was totally voluntary. Thus, no seizure took place. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 484 *et seq.*" See also *Burdeau* v. *McDowell,* 256 U.S. 465.

> intended to help the United States is not a sufficient reason to treat his actions as those of United States agents.

2. Petitioner contends (Pet. 26-42) that the district court improperly limited his cross-examination and impeachment of co-conspirator Gushi. Each of petitioner's present claims was considered and rejected by the court of appeals, upon whose thorough opinion we rely. The proper conduct and limits of cross-examination necessarily lie within the sound discretion of the trial judge, whose rulings will not be disturbed absent an abuse of discretion and a showing of prejudice. *United States* v. *Blackwood,* 456 F. 2d 526, 529 (C.A. 2), certiorari denied, 409 U.S. 863. As the court of appeals conclusively demonstrated, each of the orders challenged by petitioner was correct, and the issue of Gushi's possible motive to testify falsely "was fairly put to the jury." *United States* v. *Mahler,* 363 F. 2d 673, 677 (C.A. 2).

3. Petitioner contends (Pet. 46-49) that he was improperly subjected to multiple convictions and punishments for a single transaction.

a. Petitioner was charged under 18 U.S.C. 2113(b) with taking money belonging to six different federally insured banks. A separate count was charged for each bank whose money was taken. Petitioner argues (Pet. 46-48) that it was error to convict him on several counts, since all of the money was taken during a single criminal event. However, if Congress so intends, one transaction may constitute multiple offenses. *Ebeling* v. *Morgan,* 237 U.S. 625 (cutting several mail bags taken from the same car); *Barringer* v. *United States,* 399 F. 2d 557 (C.A. D.C.), certiorari denied, 393 U.S. 1057 (robbery of two persons at the same time). Section 2113 (b) proscribes the taking of money belonging to "any

bank" that is federally insured. The statute clearly indicates that Congress intended to protect the interests of each federally insured bank and to make each unauthorized taking therefrom a distinct and separate offense. *Ebeling* v. *Morgan, supra,* 237 U.S. at 629; *United States* v. *Canty,* 469 F. 2d 114, 126 (C.A. D.C.).[7] As the court of appeals correctly held (Pet. App. 22):

> In this case the money taken belonged to multiple banks. That the money was all taken from Purolator's vault is irrelevant. Congress was concerned with protecting bank money. A separate crime may be charged for each institution whose money is taken. Since the money at Purolator was kept segregated in separate containers, there was no question as to whose money was taken and whose money was left as there would have been if the money had been commingled.

In any event, petitioner received identical concurrent sentences on each of the six counts charging bank larceny. See *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16.[8]

b. Petitioner also claims (Pet. 48-49) that he could not properly be convicted of bank larceny under Section 2113 (b) and transportation of stolen property in interstate

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[7]Petitioner relies upon *Canty* to support his contentions (Pet. 47). Although that case held that robberies of multiple tellers within a bank are not separate takings, the money in question belonged only to a single bank. 469 F. 2d at 126.

[8]Despite petitioner's claim (Pet. 47) that the jury would have had a more difficult time in reaching a compromise verdict if he had been charged with only a single count of bank larceny, the jury's finding of guilty on each of the six counts of bank larceny submitted to it strongly suggests that the verdict was not the result of a compromise.

commerce under 18 U.S.C. 2314. In *Blockburger* v. *United States,* 284 U.S. 299, 304, this Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The court of appeals properly applied this rule to uphold the convictions (Pet. App. 23):

> The relevant elements of section 2113(b) are the taking and carrying away with the intent to steal more than $100 which belongs to a federally insured bank. The relevant elements of section 2314 are the transportation of $5000 or more in interstate or foreign commerce knowing it to have been stolen. Section 2113(b) thus requires a taking, but section 2314 does not. Section 2314 requires transportation in commerce, but section 2113(b) does not. Under the *Blockburger* test, therefore, conduct even though violating both sections constitutes two offenses since each requires proof of a fact which the other does not.

See also *Bayless* v. *United States,* 288 F. 2d 794, 795 (C.A. 9), certiorari denied, 366 U.S. 971 (violations of 18 U.S.C. 2113(a) and 2314 constitute separate offenses). Congress' desire to prevent the use of interstate commerce for the purpose of transporting stolen articles is wholly separate from its desire to protect federally insured banks from theft. See *United States* v. *Gaddis,* 424 U.S. 544, 547.

4. Petitioner contends (Pet. 42-46) that the district court erred in its instructions to the jury on the bank larceny

counts.[9] Specifically, he argues that the court made no reference to Purolator's role as agent for the banks and therefore failed to submit to the jury the issue whether theft of the money from the premises of Purolator constituted theft from the federally insured banks. As petitioner concedes (Pet. 42), however, the theft of money belonging to a federally insured bank constitutes a violation of 18 U.S.C. 2113(b), regardless of who has possession of the money when it is stolen. There is no question that the money taken by petitioner from Purolator belonged to the banks (see Pet. App. 21, n. 8). Therefore, as the court of appeals correctly observed (Pet. App. 27):

> The heart of the crime charged and the federal jurisdictional nexus was the taking of money belonging to or in the control of a federally insured bank. 18 U.S.C. §2113(b). Purolator's status as an agent, independent contractor, or otherwise was totally irrelevant to the crime charged. Under the court's instructions the jury must have found that federally insured bank money was taken. This is all that was necessary to convict under the statute. The agency language in the indictment is

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[9]The court's instructions on the elements of each of these counts were as follows (Pet. App. 26):

> To convict a defendant of this count, you must find beyond a reasonable doubt:
>
> On or about October 20, 1974, the defendant did take and carry away, with intent to steal or purloin, any amount of money in excess of $100.00 that belonged to or was in the care, control or management of the . . . Bank . . . [named in that count];
>
> And, that the . . . Bank . . . [named in that count] was a bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation.

> surplusage though there can be no doubt from the evidence in the case that the jury found the money was taken from Purolator.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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